IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 201 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?No

STATE OF GUJARAT

Versus

DAWOOD JIVAN SOLANKI

Appearance:

Shri M.A.Bukhari, Additional Public Prosecutor, for the Appellant - State.

Shri Y.S.Mankad, Advocate, for the Respondent.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 26/09/96

ORAL JUDGEMENT

The judgment and order of acquittal passed by the learned Sessions Judge of Kutch at Bhuj on 8th December 1995 in Criminal Appeal No.4 of 1995 is under challenge in this appeal by leave of this court under Section 378

of the Code of Criminal Procedure, 1973 (the Code for brief). By his impugned judgment and order, the learned Sessions Judge accepted the appeal preferred by the respondent against the judgment and order of conviction and sentence passed by the learned Judicial Magistrate (First Class) at Rapar on 30th December 1994 in Criminal Case No.764 of 1993. The learned trial Magistrate convicted the respondent herein of the offence punishable under Section 25 (1-B) (a) of the Arms Act, 1959 (the Act for brief) and sentenced him to rigorous imprisonment for one year and fine of Rs.500 in default simple imprisonment for one month.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that the respondent herein was found in possession of some fire arm without any licence or permit in contravention of Section 3 of the Act. Thereupon, a complaint was filed by the Police Sub Inspector of the Police Station at Rapar. The First Information Report in that regard is at Exh.18 on the record of the trial court. Thereafter, the necessary sanction to prosecute the respondent herein was obtained from the District Magistrate of Kutch at Bhuj by his order passed on 7th January 1993. It is at Exh.19 on the record of the trial court. On completion of investigation, the chargesheet against the present respondent was submitted to the court of the learned Judicial Magistrate (First Class) at Rapar on 22nd October 1993. It came to be registered as Criminal Case No.764 of 1993. The charge against the respondent as the accused was framed on 6th November 1993. It is at Exh.3 on the record of the trial court. He did not plead guilty to the charge. He was thereupon tried. After recording the prosecution evidence and after recording the further statement of the respondent herein as the accused under Section 313 of the Code and after hearing the parties, by his judgment and order passed on 30th December 1994 in Criminal Case No.764 of 1993, the learned trial Magistrate convicted the respondent herein of the offence punishable under Section 25 (1-B) (a) of the Act and sentenced him to rigorous imprisonment for one year and fine of Rs.500 in default simple imprisonment for one month. That aggrieved the respondent herein. He carried the matter in appeal before the Sessions Court of Kutch at Bhuj. His appeal came to be registered as Criminal Appeal No.4 of 1995. After hearing the parties, by his judgment and order passed on 8th December 1995 in the aforesaid appeal, the learned Sessions Judge accepted the appeal and set aside the aforesaid judgment and order of conviction and sentence passed by the learned trial Magistrate and

acquitted the respondent as the accused of the charge levelled against him. That aggrieved the prosecution agency. It has therefore invoked the appellate jurisdiction of this court after obtaining its leave under Section 378 of the Code for questioning the correctness of the aforesaid judgment and order passed by the learned Sessions Judge.

3. It may be mentioned that the learned Sessions Judge accepted the appeal only on the short ground that the sanction to prosecute the respondent herein was not produced along with the chargesheet and the learned trial Magistrate could not have taken cognizance of the case in absence of any valid sanction accompanying the chargesheet. The learned Sessions Judge does not appear to have examined the merits of the case while accepting the appeal. The learned Sessions Judge has relied on the ruling of the Bombay High Court in the case of STATE OF MAHARASHTRA v. HARSHED K. SHAH reported in 1981 Criminal Law Journal at page 1096 in support of his conclusion that the sanction should accompany the chargesheet before the cognizance of the case could have been taken by the learned trial Magistrate.

4. Learned Additional Public Prosecutor Shri Bukhari for the appellant - State has submitted that non-production of the valid sanction along with the chargesheet is a mere irregularity and no order of conviction and sentence could have been upset in appeal on that account in view of Section 465 of the Code. It has further been urged that it is an admitted position on record that the sanction to prosecute was obtained before submission of the chargesheet and its non-production along with the chargesheet would not vitiate the trial in view of the clear language of Section 39 of the Act. As against this, learned Advocate Shri Mankad for the respondent has urged that a valid sanction is a must before cognizance of the case was taken by the learned trial Magistrate and its absence on record would certainly vitiate the trial. He has further submitted that non-production of a valid sanction along with the chargesheet would not be a mere irregularity and it goes to the root of the matter as no cognizance of the offence could have been taken in absence of any valid sanction accompanying the chargesheet. Learned Advocate Shri Mankad for the respondent has also relied on the aforesaid ruling of the Bombay High Court in the case of HARSHED K. SHAH (supra) in support of his aforesaid submission.

5. In order to appreciate the rival submissions

urged before me, it would be quite necessary to look at Section 39 of the Act. It reads:

"39. Previous sanction of the District Magistrate necessary in certain cases:

No prosecution shall be instituted against any person in respect of any offence under Section 3 without the previous sanction of the District Magistrate."

The language is quite clear. It places an embargo on prosecution of any person in respect of any offence under Section 3 of the Act without the previous sanction of the District Magistrate. It thus becomes clear from its bare perusal that what is forbidden or prohibited thereby is prosecution without the previous sanction. It does not place an embargo on the court against taking cognizance of the offence without any valid sanction.

6. As pointed out hereinabove, the sanction to prosecute the respondent herein under Section 25 (1-B) (a) of the Act for contravention of Section 3 thereof was obtained on 7th January 1993. The chargesheet was submitted only thereafter on 22nd October 1993 to the competent criminal court. It cannot be gainsaid that prosecution is launched only when the chargesheet is submitted to the competent criminal court. It thus becomes clear that the sanction to prosecute the respondent herein for the aforesaid offence was obtained prior to institution of the prosecution in this case. In that view of the matter, there is no escape from the conclusion that the requirement of Section 39 of the Act was fully satisfied in the present case.

7. The aforesaid ruling of the Bombay High Court in the case of HARSHED K. SHAH (supra) can be distinguished on its own facts. In that case, the accused were prosecuted for the offence punishable under Section 19 (1) read with Section 34 of the Bombay Money-Lenders Act, 1946. Section 35-B thereof requires obtaining of a valid sanction before the cognizance of the offence is taken. Section 35-B thereof reads:

"35-B Cognizance of certain offences -

No Court shall take cognizance of any offence punishable under Section 34 for contravening the provisions of Section 18 or Section 19 except with the previous sanction of the Registrar."

It becomes clear that it is enjoined upon the court not to take cognizance of any offence punishable under Section 34 thereof for contravening the provisions of Section 18 or Section 19 thereof except with the previous sanction of the Registrar. It thus becomes clear that, in that case, an embargo is placed on the court against taking cognizance of the offence in absence of any valid sanction from the Registrar thereunder. In the case before the Bombay High Court, the valid sanction did not accompany the chargesheet. The court did not have any material before it to come to the conclusion that there was a valid sanction to prosecute the accused under Section 19 read with Section 34 thereof. In that view of the matter, according to the Bombay High Court, no cognizance could have been taken of the offence in that case. The aforesaid ruling of the Bombay High Court will not be applicable in the present case. In the case before me, Section 39 of the Act places an embargo against institution of a prosecution for breach of Section 3 thereof. It does not enjoin a duty upon the court not to take cognizance of the offence in contravention of Section 3 of the Act without any previous sanction. The wordings of Section 39 of the Act and those of Section 35-B of the Bombay Money-Lenders Act, 1946 are quite different. The aforesaid two statutory provisions are not pari materia. I am therefore of the opinion that the aforesaid ruling of the Bombay High Court in the case of HARSHED K. SHAH (supra) will not be applicable in the present case.

8. Since I am of the opinion that the requirement of Section 39 of the Act regarding institution of prosecution after the previous sanction in this case was satisfied, I have not thought it fit to deal with the binding ruling of the Supreme Court in the case of NAGRAJ v. STATE OF MYSORE reported in AIR 1964 Supreme Court at page 269 and the ruling of the Delhi High Court in the case of SMT. JAVITRI DEVI v. STATE reported in 1971 Criminal Law Journal at page 1340 as relied on by learned Advocate Shri Mankad for the respondent in support of his submission that no prosecution can lie without any valid previous sanction under Section 39 of the Act. Similarly, I have not chosen to deal with the submission urged before me by learned Additional Public Prosecutor Shri Bukhari for the appellant based on Section 465 of the Code.

9. In view of my aforesaid discussion, I am of the opinion that the impugned judgment and order of acquittal passed by the learned Sessions Judge of Kutch at Bhuj cannot be sustained in law. It has to be quashed and set

aside. Since the merits of the case were not examined in appeal, the matter deserves to be remanded to the learned Sessions Judge for restoration of the appeal to file and for his fresh decision according to law on merits of the case.

10. In the result, this appeal is accepted. The judgment and order passed by the learned Sessions Judge of Kutch at Bhuj on 8th December 1995 in Criminal Appeal No.4 of 1995 is quashed and set aside. The matter is remanded to the Sessions Court of Kutch at Bhuj for restoration of the appeal to file and for its fresh decision according to law on merits of the case. The bail bonds pursuant to the order of this court stand cancelled with revival of the bail bonds, if any, given in the appellate proceeding before the Sessions Court of Kutch at Bhuj. .....